United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-6076

To be argued by
DENNISON YOUNG, JR.

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 76-6076

W. J. USERY, Secretary of Labor, United States Department of Labor,

Plaintiff-Appellee,

—against—

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF APPELLEE W. J. USERY, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York,
Attorney for W. J. Usery, Secretary of Labor, Plaintiff-Appellee.

DENNISON YOUNG, JR.,
STUART I. PARKER,
FREDERICK P. SCHAFFER
Assistant United States Attorneys,

FRANCIS V. LA RUFFA
Regional Solicitor
RUDOLPH E. DE MEO
Attorney
United States Department of Labor
Of Counsel.

TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE

Statutes:

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6076

W. J. USERY, Secretary of Labor, United States Department of Labor,

Plaintiff-Appellee,

—against—

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO,

Defendant-Appellant.

BRIEF ON BEHALF OF APPELLEE W. J. USERY, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

Preliminary Statement

Defendant-appellant International Organization of Masters, Mates and Pilots, International Maritime Division, ILA, AFL-CIO ("IOMM&P" or "union") appeals from a Final Judgment and Order of the Honorable Constance Baker Motley entered in the United States District Court for the Southern District of New York on April 15, 1976, granting judgment to plaintiff-appellee W. J. Usery, Secretary of Labor, United States Department of Labor (the "Secretary") declaring the 1971 election of IOMM&P's International and Offshore Division officers void and ordering that a new election of officers be conducted under the supervision of the Secretary by the end of 1976. The judgment was entered April 15, 1976

after Judge Motley in a written decision dated March 17, 1976 granted summary judgment to the Secretary, holding that the union had violated Section 401 of The Labor Management Reporting and Disclosure Act (the "Act"), 29 U.S.C. § 481, and that a new election under the Secretary's supervision was required pursuant to Section 402 of the Act, 29 U.S.C. § 482.*

Questions Presented

1. Whether the District Court was correct in concluding that the union's Newsletter was campaign literature prepared and distributed in violation of Section 481?

2. Whether the District Court correctly held that the union's election of officers conducted in 1974 could not moot or in any other way affect this action?

3. Whether it was appropriate for the District Court to defer ruling on the legality of those provisions in the IOMM&P Constitution and Offshore Division By-Laws requiring that the union's three International officers automatically become the three top officers of the union's Offshore Division without a separate election for said positions among the members of the Offshore Division? In the alternative does this scheme violate the provisions of Section 481?

4. Whether the District Court properly ordered the new election under the Secretary's supervision to be completed by December 31, 1976 rather than delaying it for another year so that it could be conducted during the union's next regularly scheduled election as the union had requested?

---

* Hereinafter all references to the Act will be cited to the United States Code; e.g. Section 401 of the Act will be referred to as Section 481, etc.

Statement of the Case

In his complaint the Secretary alleged that the IOMM&P committed various violations of Section 481 during the course of its 1971 election of officers which required that the Court void that election and order a new one subject to the Secretary's supervision.

The Secretary, after extensive discovery, moved for summary judgment with regard to the following five violations alleged in his complaint:

1. The preparation and mailing by the IOMM&P of the "60th Convention Newsletter on the Resolution of Affiliation of the IOMM&P with the ILA" (the "Newsletter") using union funds, mailing lists and other resources violated Sections 481(c) and (g);

2. The preparation and mailing by the IOMM&P of another document entitled "All Constitutional Amendments and Resolution of the 60th Convention Ratified—Affiliation of IOMM&P as the International Maritime Division of the ILA (AFL-CIO) Affirmed" (the "Eleven Pledges" document) using union funds, mailing lists and other resources violated Sections 481(c) and (g);

3. The IOMM&P's prohibition of certain members of its Offshore Division's Atlantic and Gulf areas from participating in any way during the union's 1971 election in the selection of Offshore Division Vice Presidents for the Atlantic and Gulf areas violated Section 481(e);

4. The IOMM&P's failure to mail election ballots within 30 days after the close of nominations, which was contrary to its own constitution's dictates, violated Section 481(e); and

5. The IOMM&P's failure to provide candidates with a certified list of Local 88 (now Port of New York) members, which was contrary to the Offshore Division By-Law requirements, violated Section 481(e).

The IOMM&P opposed the Secretary's motion, cross-moving for summary judgment on the third issue. It also moved for summary judgment in its own right, primarily arguing that the case was moot because an election had been conducted by the union in 1974, even though it was not supervised by the Secretary. The IOMM&P moved in addition for partial summary judgment seeking to dismiss certain of the Section 481 violations alleged by the Secretary but which were not part of his summary judgment motion. Consideration of the IOMM&P's motions was deferred by the District Court pending determination of the Secretary's motion (A. 3152).*

The District Court granted the Secretary's motion and declared the IOMM&P's motions moot (Opinion, A. 2864-2865). The Court held that the union's Newsletter constituted campaign literature prepared and distributed in violation of Section 481 which "may have affected" the outcome of the elections in question;** accordingly said elections were voided and a new election ordered. Recognizing that this violation would require a new election the Court did "not feel it necessary to consider the additional four violations alleged by the Secretary . . . since the newsletter violation upon which the motion is hereby granted, comprehends all of the contests in the election which are involved in the additional alleged violations, and any decision regarding such violations would not affect the ultimate disposition of the case." (Opinion, A. 2888-2889).

---

* Hereinafter, the Joint Appendix will be referred to by the letter "A" followed by the appropriate page number.

** Section 482 requires a finding that certain Section 481 violations "may have affected" the outcome of the questioned election. Once the violation is proved, however, the burden shifts to the union to show that the violation "did not affect the outcome of the election." See p. 18, *infra*.

The union raises four issues on appeal.* With respect to each there are no material facts genuinely in dispute. All that is called for is legal interpretation.

---

* In reaching its conclusion the District Court also decided several preliminary issues which the IOMM&P does not challenge herein. First, the District Court held that union members had properly and timely filed complaints concerning alleged 1971 election violations with the Secretary pursuant to the requirements of Section 482(a) thereby triggering the Secretary's action. (Opinion, A. 2865-2868). The IOMM&P initially questioned the timeliness of the filings with the Secretary, but that issue has now been abandoned on appeal. (Appellant's Brief, p. 16.)

Second, the District Court determined that summary judgment was appropriate in this case since there was no genuine issue of material fact either as to the commission of a Section 481 violation or as to the inability of the union to produce evidence sufficient to overcome the presumption that such violation may have influenced the results of the election at issue. (Opinion A. 2877-2878). This determination also has never been questioned by the union and is specifically not raised on appeal. (Appellant's Brief, p. 16).

Third, the District Court articulated the standards of proof necessary for a union to defeat the Secretary's action in a case such as this. Simply stated the Secretary is obliged under Section 482(c) of the Act to prove the existence of a Section 481 violation and that such violation "may have affected" the outcome of the election in question. Once the violation is proved, however, a *prima facie* case is established that the violation "may have affected" the election and the defendant union must then prove that the violation did not affect the outcome of the election.

In addition the District Court found that the Secretary had proved that the preparation and distribution of the Newsletter by the union was a Section 481 violation and, inasmuch as there was no tangible evidence which the union could possibly introduce to prove that such violation did not affect the outcome of the election, the Secretary had successfully shown that said violation "may have affected" the outcome of the election. While the union challenges the District Court's finding that the preparation and distribution of the Newsletter constituted a violation of Section 481, it does not contest the District Court's conclusion that such violation, assuming it was proved, was sufficient to satisfy the "may have affected" requirement.

First, as noted the District Court found that the Newsletter constituted campaign literature prepared and distributed in violation of Section 481. This finding was based on the Court's evaluation of the Newsletter and the context in which it was distributed as well as on a determination that the IOMM&P was bound to this conclusion by an identical finding on the identical issue as a party to a previous proceeding before another District Judge in the Southern District of New York (Croake, *J.*), (Opinion, A. 2882-2883). The union now asks this Court to interpret the Newsletter and the context in which it was distributed as not being campaign literature, and that it also find that the union is not bound by the previous decision to the same effect.

Second, Judge Motley held that the union's intervening unsupervised 1974 election of officers did not moot the Secretary's action. (Opinion, A. 2869-2872). The union challenges this conclusion.

Third, the union contends that the District Court erred in refusing to decide at this juncture the legality of a scheme set forth in the union's Constitution and its Offshore Division's By-Laws, which requires the executive officers of the Offshore Division to hold office without separate nominations and elections for those positions among the members of the Offshore Division.

Finally, the union argues that the District Court should not have compelled the IOMM&P to complete a new supervised election by December 31, 1976 rather than permitting such election to coincide with the next regularly scheduled election in late 1977.

As will be demonstrated below, all of these arguments are without merit. In addition, the Secretary submits, and the union does not contest, that there were no material

facts genuinely in dispute with respect to the other alleged violations on which the Secretary moved for summary judgment, but on which the District Court did not pass.

Thus if this Court agrees that the instant action has not been mooted or otherwise been affected by the 1974 election, the Government contends that this Court should review those violations to support the District Court's holding in the event the Newsletter is held not to constitute campaign literature.

Statement of Facts

The Structure of the Union in 1971

The IOMM&P is a national union consisting of approximately 10,500 ship deck officers, including ship captains and ship pilots, with officers in major ports throughout the United States. (¶¶ 1, 2 and 3, Pltf.'s 9(g) Stmt., A. 1261-1262).* As a labor organization it is required to adhere to the provisions of Section 481 (¶¶ 4 and 5, Pltf.'s 9(g) Stmt., A. 1262).

---

* We cite to the statement of facts submitted below by the Secretary together with his summary judgment motion pursuant to Rule 9(g) of the General Rules of the Southern District of New York (A. 1261-1287) principally to eliminate unnecessary and redundant referencing to other parts of the lengthy Joint Appendix. Essentially these factual statements were not—and, clearly, are not now—contested and were otherwise supported by statements made by the union in its answer or in response to different phases of discovery or by the union's own documentary material, much of which was annexed as exhibits to the Rule 9(g) Statement itself. Wherever appropriate in the Secretary's Rule 9(g) Statement reference was made below the factual statements therein to material which supports the statements set forth, all of which has been included in the Joint Appendix should the Court find reference to it necessary. A description of that material is contained on the first page of the 9(g) Statement (A. 1261) and

[Footnote continued on following page]

On October 1, 1970 the IOMM&P's newly adopted Constitution became effective (¶ 7, Pltf's 9(g) Stmt., A. 1262). This Constitution reorganized the IOMM&P into Divisions. (IOMM&P Constitution,* Art. I., Sec. 2, A. 1296).

The Offshore Division is the largest division and is comprised of former offshore locals, now denominated as Ports. (¶ 9, Pltf's 9(g) Stmt., A. 1262). The members of the Offshore Division are seagoing ships' officers, sailing aboard Atlantic, Gulf and West Coast ocean going vessels (¶ 11, Pltf.'s 9(g) Stmt., A. 1263). In 1971 there were approximately 8205 members of the Offshore Division. (¶ 10, Pltf.'s 9(g) Stmt., A. 1263). The Offshore Division By-Laws effective in 1971 are annexed to the Secretary's 9(g) Statement as Exhibit B. (¶¶ 12 and 21, Pltf.'s 9(g) Stmt., A. 1263-1264, and 1344).

The Inland Division is composed of inland locals and consists of ships' officers assigned to vessels sailing in inland rivers, bays and sounds of the United States. (¶ 16, Pltf.'s 9(g), Stmt., A. 1263). There were approximately 1500 members of the Inland Division in addition to approximately 600 from Inland Local 47

---

an index to the exhibits may be found at page A. 1288. To dispel any question regarding those few instances where the union queried the accuracy of the statements made by the Secretary, the Secretary prepared an "Analysis of Defendant's Denials" which was included as Exhibit A to the appendix accompanying the Secretary's Reply Memorandum below. This analysis appears in the Joint Appendix on page A. 1987 through A. 1996 and demonstrates the support for the factual statements made or shows the irrelevancies of the denials set forth. It is clear, however, that the union is not contesting any of the factual statements made and accordingly we believe it would be unnecessary, and perhaps more confusing to the Court than helpful, to cite excessively to the various parts of the Joint Appendix.

* The IOMM&P Constitution was annexed to the Secretary's Rule 9(g) Statement as Exhibit A. (A. 1291).

which Local's association with the IOMM&P was in question and whose members did not vote for International officers. (¶¶ 15 and 17, Pltf.'s 9(g), Stmt., A. 1263).

A third division, the Pilots Division, consisted of approximately 550 members employed aboard American and foreign flag oceangoing vessels as ships' pilots (¶ 18, Pltf.'s 9(g), Stmt., A. 1263).

The elections the Secretary contested herein are those of the three International Officers—the International President, International Executive Vice-President and International Secretary-Treasurer; and those of the Offshore Division's officers.

The 1971 Election

The IOMM&P's 1971 election of officers was conducted pursuant to the provisions of the newly adopted International Constitution which became effective October 1, 1970. (¶¶ 7 and 20, Pltf.'s 9(g), Stmt., A. 1262 and 1264). The elections for the Offshore Division were conducted pursuant to the Offshore Division's By-laws, also effective October 1, 1970, as well as pursuant to the International Constitution. (¶¶ 12 and 21, Pltf.'s 9 (g), Stmt., A. 1263 and 1264).

The Convention

At the 60th convention held in Galveston, Texas, July 26, 1971 to July 28, 1971, nominations were accepted for the International offices pursuant to Article V, Section 5 of the IOMM&P Constitution. (¶ 22, Pltf.'s 9(g), Stmt., A. 1264 and 1311). An International Ballot Committee comprised of five delegates was nominated and elected. (¶ 23, Pltf.'s 9(g), Stmt., A. 1264).

International President O'Callaghan, International Executive Vice-President Caldwell and International Secretary-Treasurer Lowen were nominated for re-election to their respective offices. The challengers included Lloyd W. Sheldon and Robert Boyle Wright for International President; George Vance and Amos E. Koonce for International Vice-President; and Charles O. Norstrand and George H. Balser for International Secretary-Treasurer (¶¶ 39 and 40, Pltf.'s 9(g), Stmt., A. 1266-1267).

Nominations for offices of the Offshore Division were conducted at the division level and not at the International Convention (¶ 25, Pltf.'s 9(g), Stmt., A. 1264) but also were completed by July 28, 1971 (¶¶ 122 and 123, Pltf.'s 9(g), Stmt., A. 1282). The elections for all offices of the Offshore Division were conducted simultaneously with the election for International Officers. (¶ 26, Pltf.'s 9(g), Stmt., A. 1264-1265).*

Aside from the election the other major piece of business at the 1971 convention was a proposed union-wide referendum on the question of whether the IOMM&P should affiliate with the International Longshoremen's Association ("ILA"). (Appellant's Brief, pp. 9, 19). Incumbent International President O'Callaghan was a strong proponent of affiliation (Appellant's Brief, p. 9; p. 21, *infra*; see also statement under O'Callaghan name on every ballot, A. 1359-1385) as was Teddy Gleason, the President of the ILA (Appellant's Brief, p. 9). Challenger Sheldon was an equally strong opponent of affiliation and was the only delegate at the convention to vote against affiliation. (A. 1786 and 1999; Appellant's Brief, pp. 9-10). Remarks made by Gleason and others at

---

* The Offshore Division By-Laws, Art. XIX, Sec. 2(a), required that nominations be held in June 1971 and that the election be conducted at the same time as the election for International officers. (A. 1356).

the convention were excerpted, reprinted and circulated to the membership in the union's Newsletter. These remarks were laudatory of incumbent O'Callaghan but vilified challenger Sheldon and those associated with him. (See *infra*, pp. 13, 14). Indeed, they not only took issue with Sheldon's position on affiliation but also attacked his motives and integrity.

A resolution on affiliation passed the convention and a referendum was presented to the membership. The referendum was conducted over a three month period from August 20 to November 23, 1971 (¶ 131, Pltf.'s 9(g), Stmt., A. 1283) which period overlapped with the balloting for union officers which ran from September 21 to December 22, 1971. (¶¶ 29 and 30, Pltf.'s 9(g), Stmt., A. 1265).*

Mechanics of the Election

The American Arbitration Association ("AAA") was selected by IOMM&P as the impartial balloting agency to conduct the election, pursuant to Article V, Section 3 of the IOMM&P Constitution and Article V, Section 3 of the Offshore Division By-Laws. The AAA in conjunction with the union's International Ballot Committee handled the mechanics of the election including the preparation, distribution, and counting of the ballots. (¶ 28, Pltf.'s 9(g), Stmt., A. 1265). Additionaly, the AAA served as the central location for the inspection of membership lists and the distribution of campaign literature. (¶ 28, Pltf.'s 9(g), Stmt., A. 1265).

On the front side of ballots sent to Offshore Division members the candidates for International office were presented; on the reverse side candidates for Off-

---

* The reason for the lengthy voting period is because the voters are so frequently at sea that one election date is not feasible. Also the voters are spread out all over the country so that a single place for personal voting is impossible.

shore Division offices were listed. (See Exhs. D1-D9, Pltf.'s 9(g) Stmt., A. 1359-1383).* Ballots received no later than December 21, 1971 (¶ 31, Pltf.'s 9 (g) Stmt., A. 1265), the last day of the three month voting period, were counted on December 22, 1971. (¶¶ 60 and 61, Pltf.'s 9(g), Stmt., A. 1271). On January 12, 1972 the AAA certified the election results. (See ¶ 62 and Exhibit M, Pltf.'s 9(g), Stmt., A. 1271 and 1413).

The O'Callaghan Team-Victors

The incumbents O'Callaghan, Caldwell and Lowen, won re-election to the three International offices. (See ¶¶ 60 and 69, Pltf.'s 9(g) Stmt. A. 1271-1272. They, together with incumbent officers in the Offshore Division Port offices, ran as part of the "O'Callaghan team" (¶¶ 56, 57 and 58, Pltf.'s 9(g), Stmt., A. 1269-1270).** Those on the O'Callaghan team are all noted appropriately on Exhibit E annexed to the Secretary's 9(g) Stmt. (A. 1386). All *** those on the O'Callaghan team at the December 22, 1971 counting of the ballots, either won outright or won a sufficient number of votes to enter a run-off. (See ¶¶ 60 and 69, Exhs. M and P, Pltf.'s 9(g) Stmt. (A. 1271, 1272, 1413 and 1430).

Under the IOMM&P Constitution and the Offshore Division By-Laws, the International President, International Executive Vice President and the International

---

* Members of the Pilots Division voted for International Officers as well as for their own officers. (See sample Pilots' ballot, Exh. F-2, Pltf.'s 9(g) Stmt. A. 1393-1395. Members of the Inland Division only voted for International officers (Exh. F-1, Pltf.'s 9(g) Stmt. A. 1391-1392.

** There were a number of elections in which no incumbents ran. They were, nevertheless, supported by, and accordingly were part of, the O'Callaghan team. (See ¶ 58 (footnote), Pltf.'s 9(g) Stmt., A. 1269-1270).

*** With the exception of one minor candidate. (See ¶ 58 (footnote), Pltf.'s 9(g) Stmt., A. 1269-1270).

Secretary Treasurer automatically become without separate elections the Executive Officer, Assistant Executive Officer and Financial Officer of the Offshore Division, respectively. See Art. IX, Sec. 8, IOMM&P Constitution, A. 1331-1332; Art. V Sec. 1, Offshore Division By-Laws, A. 1348). There is no separate election for those Offshore Division positions among the members of that Division despite the fact that those officers have significant responsibilties and perform significant duties for the Offshore Division alone (see Offshore Division By-Laws, Art. VI, Sec. 1; Art. VI, Sec. 2; and Art. VI, Sec. 3; A. 1348-1349).

Thus, as a result of their election to their International offices, O'Callaghan, Caldwell and Lowell became, respectively, the Executive Officer, Assistant Executive Officer and Financial Officer of the Offshore Division.

The Newsletter

The Newsletter containing Gleason's remarks, which praised O'Callaghan and vilified Sheldon, was mailed to each member by the IOMM&P on August 19, 1971 (¶ 82 and Exh. BB, Rule 9(g) Stmt., A. 1274). The Newsletter's preparation, duplication and distribution were paid for with more than $3,000 received by the IOMM&P by way of dues, assessments or similar levy (¶ 83, Rule 9(g), Stmt., A. 1275; Opinion, A. 2879). It was sent to approximately 10,400 members in mailing using addresses on file at the International headquarters on a computerized list. (¶ 85, Rule 9(g), Stmt., A. 1275).

The Secretary contended and Judge Motley so found (Opinion, A. 2882) that the Newsletter was election campaign literature prepared and distributed in violation of Section 481.

The Action Before Judge Croake

With respect to this Newsletter, on September 16, 1971, just before the election ballots were mailed, Sheldon and two other candidates, brought an action against O'Callaghan, Caldwell, and Lowen and the IOMM&P. (¶ 86, Pltf.'s 9 (g) Stmt. A 1275). They alleged, *inter alia*, that the Newsletter was campaign literature prepared and distributed at the expense of the defendant IOMM&P and that this denied them the right to have campaign literature equally distributed in violation of 29 U.S.C. § 481(c). (¶ 87, Pltf.'s 9(g) Stmt., (A. 1275). See *Sheldon* v. *O'Callaghan*, 335 F. Supp. 325, 326 (S.D.N.Y., 1971)).

In a decision dated October 18, 1971, Judge Croake found the "'Newsletter' containing electioneering for the incumbent candidate, *ad hominem* attacks upon an opposition candidate, coupled with the timing of the distribution, constitute[d] campaign literature for defendant O'Callaghan, distributed at the expense of defendant labor organization" *Sheldon* v. *O'Callaghan*, 335 F. Supp. at 327.*

On November 4, 1971, Judge Croake ordered the IOMM&P to publish and distribute literature submitted by the plaintiffs in that action in a manner similar to the publication and distribution given the Newsletter,

---

* In his opinion, footnotes 1 and 2, Judge Croake cited various passages of campaign oratory benefiting O'Callaghan and his slate. *Sheldon* v. *O'Callaghan*, 335 F. Supp. at 326-327. We quote just one such passage:

> I trust O'Callaghan, and if O'Callaghan wasn't the top man here I'd think twice before saying I want the affiliation to go through with the Masters, Mates and Pilots. . . . O'Callaghan I trust. ("Newsletter", p. 5, A. 1459).

The full Newsletter is found in the Joint Appendix at A. 1455-1462.

with equal force and with equal treatment as to the expense of such distribution. (¶ 89 and Exh. DD, Pltf.'s 9(g) Stmt., A. 1276 and 1468-1469). However, Judge Croake denied the plaintiffs' motion to restrain the mailing of ballots, which plaintiffs had sought in order to ensure that their material would be received by the members before they cast their ballots. Judge Croake denied this relief in view of the availability of post-election remedies to plaintiffs with the Secretary of Labor, those very remedies which the Secretary seeks herein. 335 F. Supp. at 328-29.

Pursuant to Judge Croake's November 4, 1971 order, plaintiff Sheldon submitted his literature to the AAA sometime shortly before November 9, 1971. (¶ 91 Rule 9(g) Stmt., A. 1277). The AAA mailed Sheldon's literature shortly after November 9, 1971. (¶ 92 Rule 9(g) Stmt., A. 1277). By then many of the election ballots had been returned. (¶ 93, Pltf.'s 9(g) Stmt., A. 1277).

In the instant case the District Court concluded that Judge Croake's finding, that the Newsletter was campaign literature prepared and distributed in violation of Section 481, collaterally estopped the IOMM&P from asserting otherwise, and that that finding alone was sufficient to establish a *prima facie* case that said violation "may have affected the outcome of the election." (Opinion, A. 2882).

The 1974 Union Election

In late 1974 the IOMM&P conducted its regularly scheduled election of officers, unsupervised by the Secretary of Labor. (See Appellant's Brief, p. 13).

In that election International President O'Callaghan and International Vice-President Caldwell were forced into a run-off, neither having received the necessary 40%

plurality, and both ultimately were defeated.* Similarly, a number of others associated with the O'Callaghan team lost although incumbent International Secretary-Treasurer Lowen and approximately fifty percent of the O'Callaghan slate won. (See Exhs. I and J annexed to the appendix submitted with the Secretary's Reply Memorandum in the District Court, A. 2062 and 2075; p. 32 n.1, *infra*).

The Case Before Judge Knapp

In 1970 certain members of the IOMM&P brought suit against the union claiming that the 1970 Constitution had been adopted improperly in that dissident views on the adoption of that Constitution had not been properly disseminated by the union officers. The Second Circuit in a decision dated June 13, 1974 reversed the initial decision of United States District Judge Whitman Knapp dismissing the complaint and remanded for further evidence to be taken. See *Sheldon* v. *O'Callaghan*, 497 F.2d 1276 (2d Cir. 1974), *cert. denied*, 419 U.S. 1090 (1974).**

---

* O'Callaghan was defeated by Captain Scavo and Caldwell was defeated by Captain Johnson. During the run-off stage, when victory was not yet assured, Captains Scavo and Johnson, together with a defeated candidate for International Secretary-Treasurer, Captain Brown, (the "Scavo Group") moved to intervene or in the alternative to file an amicus curiae brief. (A. 3154). They were permitted to file an amicus brief only. (A. 3153). The Scavo group urged at that time that the action be placed in suspense until the run-off election was complete and a determination made as to the fairness of the 1974 election. To that extent they agreed with the IOMM&P position that the 1974 election could moot the 1971 case. They suggested, however, that such a determination of fairness would be unnecessary if Scavo and Johnson won but then continued to argue that if they lost O'Callaghan should have the burden of proving the election was fair. If O'Callaghan failed to meet that burden, they went on, then the Secretary's case should be resumed.

** This case should not be confused with the case styled *Sheldon* v. *O'Callaghan* heard by Judge Croake wherein Judge Croake found the Newsletter to be campaign literature distributed in favor of O'Callaghan and his slate.

On July 2, 1975 Judge Knapp heard additional evidence and on August 5, 1975 he rendered judgment for plaintiffs, finding plaintiffs had not been given the opportunity to disseminate their views. (A. 3060). The relief provided by Judge Knapp did not void the 1970 Constitution under which the 1971 election of officers was held. Rather, a lengthy procedure was established whereby the union is to take action to allow the membership to reconsider and vote upon the 1970 Constitution. Essentially the union has one year from the conclusion of appellate procedures to conduct a referendum to approve or disapprove the 1970 Constitution; should the membership disapprove it, then within that one year period the union is to propose a new constitution and put it to a referendum as well; and if that fails the constitution in effect prior to the adoption of the 1970 Constitution becomes effective. On February 26, 1976 Judge Knapp's judgment was affirmed by the Second Circuit.

The significance of this case lies only in the fact that as a result of its holding the union suggests that the constitution "could" be discarded in 1977 and that an election would then have been compelled unnecessarily. (Appellants' Brief, pp. 32-33). Judge Motley found the possibility of the 1970 Constitution being discarded and yet another election mandated "far too tenuous to prevent this court from remedying the violations which it finds to have occurred in the matter duly before it." (Opinion, n.2, A. 2890).

ARGUMENT

POINT I

The "Newsletter" was campaign material distributed in violation of Section 481 of the Act which violation may have affected the outcome of the 1971 election.

A. The District Court correctly found that the Newsletter may have affected the outcome of the 1971 election

Section 482(c) sets forth the standards a court is to apply in determining whether to invoke the supervised election remedy as follows:

> "(c) If, upon a preponderance of the evidence after a trial upon the merits, the court finds—
>
> * * * * *
>
> (2) that the violation of Section 481 [401 of the Act] of this title may have affected the outcome of an election,
>
> the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary . . ."

In *Wirtz* v. *Hotel Motel & Club Employees U., Local 6*, 391 U.S. 492, 506-507 (1968) the Supreme Court held that a proved violation of Section 481 [401 of the Act] creates a *prima facie* case that the violation "may have affected the outcome" of the election and that the only way a defendant union may overcome such a *prima facie* case is to prove with tangible evidence that the violation did not affect the outcome of the election. (Opinion, A. 2872-2876).

It is equally well settled that there will be certain situations where it will be impossible for a union to prove that the election was not affected by the violation at all. See *Hodgson* v. *Liquor Salesman's Union, Local No. 2*, 334 F. Supp. 1369 (S.D.N.Y.), *aff'd*, 444 F.2d 1344 (2d Cir. 1971);* *Brennan* v. *Local U. No. 639, Int. Bro. of Teamsters, Etc.*, 494 F.2d 1092 (D.C. Cir. 1974); *Brennan* v. *Sindicato Empleados de Equipo Pesado, Eetc.*, 370 F. Supp. 872, 879 (D.P.R. 1974); *Shultz* v. *Radio Officers U. of United Telegraph Wkrs.*, 344 F. Supp. 58, 64 (S.D.N.Y. 1972); *Wirtz* v. *American Guild of Variety Artists*, 267 F. Supp. 527 (S.D.N.Y. 1967).

As Judge Motley recognized the instant case falls in this category. There is no tangible evidence which the union could offer which would show that the Newsletter did not have some impact on those who voted in the election. No facts are alleged in the material submitted by the union which, if accepted as true, would support a finding that the Newsletter had no effect on the election's outcome. On the contrary, the undisputed facts clearly support the District Court's finding that the preparation and distribution of the Newsletter at union expense may have affected each vote in the election. (Opinion, A. 2885-2888).

Nor can it be argued that the mailing of the Sheldon material on November 9, 1971 purged the taint of the

---

* There a union publication found to be campaign material prepared in violation of Section 481(g), a violation similar to the one the Court is called upon to examine in the instant case, was circulated to the members just prior to the date of the election. Applying the logic of the *Hotel, Motel* case, *supra*, the Court held that in a case such as this there could be no tangible evidence presented to overcome the presumption that the violation may have affected the votes of the members and therefore the outcome of the election.

Newsletter. By the time Sheldon's literature was mailed out, over half the ballots — 3000 to 4000 — had been returned to the AAA. (¶ 93, Pltf.'s 9(g) Stmt., A. 1277). As the District Court found, these returned ballots were more than sufficient to have possibly affected the outcome of all the International and Offshore Division contests. (Opinion, A. 2886-2887). In addition, Sheldon was associated with a number of other candidates in the subject election. (¶ 59, Pltf.'s 9(g) Stmt., A. 1270). There were many — such as third and fourth parties in a race — who in any event could claim no benefit from Sheldon's material and were not covered by Judge Croake's order to the IOMM&P to allow distribution at IOMM&P expense. Thus, where these additional candidates existed, the mere preparation and distribution of the Newsletter would be enough to have possibly affected the outcome of those elections. (Opinion, A. 2886).

The union does not and can not challenge the District Court's finding that the Newsletter may have affected the outcome of the election. Rather, the union limits its attack to Judge Motley's holding that the Newsletter was campaign literature. In so doing, the union asks this Court to ignore the contents of the Newsletter and the undisputed facts regarding the circumstances surrounding its distribution and to overlook the doctrine of collateral estoppel.

B. The Newsletter was campaign literature

On August 19, 1971 the IOMM&P mailed the Newsletter, which was paid for with union funds, to all of its members. As we have noted in the statement of facts, the Newsletter's ostensible purpose was to support IOMM&P affiliation with the ILA. However, it went much further. It praised O'Callaghan for supporting

affiliation. Indeed, it suggested that for affiliation to work O'Callaghan would have to be at the head of the union (see pp. 13, 14, *supra*). It also brutally attacked those who opposed affiliation. While it may not have mentioned the opponents by name, it was well known that O'Callaghan's chief challenger for President, Sheldon, was as vigorously opposed to affiliation as O'Callaghan was for it.[20]

Both O'Callaghan and Sheldon and their respective slates made affiliation a principal issue of the election campaign. O'Callaghan boldly linked this issue to his campaign right on the face of the secret ballot for the election of officers. Thereon as the last reminder before voting in the last line of his statement under his name he says: "I request that the membership vote in favor of affiliation with the ILA." (A. 1360). Additionally his campaign literature is peppered with reminders that O'Callaghan supported affiliation. (A. 1400, 1404, 1407-1408).[21] Conversely, Sheldon was the one delegate at the convention to vote against affiliation (A. 1786) and his literature also focused on affiliation (¶ 59 and Exh. MM, Pltf.'s 9(g) Stmt., A. 1270, 1562-1571).

---

[20] Furthermore, once the referendum on affiliation was over, the union announced the positive results in another document. This document entitled "All Constitutional Amendments and Resolution of the 66th Convention Ratified—Affiliation of IOMM&P as the International Maritime Division of the ILA (AFL-CIO) Affirmed" was mailed on November 26, 1971 in the middle of the election period. The third page of this four page document contained a joint letter from O'Callaghan and Gleason pledging their joint effort in eleven areas thereby reaffirming O'Callaghan as the champion of affiliation. Additionally on the back page, in bold face, was a reminder that December 21, 1971 was the deadline for voting for officers. (¶¶ 103, 104 and 105, Pltf.'s 9(g) Stmt., A. 1279).

This document too, the Secretary alleged was campaign literature prepared and distributed in violation of Sections 481(c) and (g), but Judge Motley did not reach this matter.

In view of the great lengths both candidates went to identify themselves with the affiliation issue, it is no wonder that the two District Judges who had the Newsletter before them found it to be campaign literature and summarily rejected the union's contention that it was not campaign literature favorable to O'Callaghan and his slate. The union on this appeal persists in arguing that the Newsletter was not campaign literature, that it was nothing more than a normal union publication on a subject of importance distributed as part of the union's customary business. However, a reading of the document reveals this is not one merely listing the pros and cons on an issue of importance to the union. Rather, it is advocacy literature filled with robust, fighting words attacking the personal character of the opponents of affiliation just as much as, if not more than, their positions on the issue. It was distributed after the candidates and their positions on affiliation, a principal issue in the campaign, were known to the membership.

Given this set of circumstances and the fact that the election was about to take place, the conclusion is inescapable that the Newsletter was a helpful campaign tool for O'Callaghan and his team. Thus, the District Court correctly found that the Newsletter was campaign literature distributed at union expense. The Secretary therefore submits that the union violated Section 481 in the following three ways:

1. By preparing and distributing this campaign literature using union resources, the union violated Section 481(g);

2. By distributing the Newsletter using its lists of members, the union did not "refrain from discriminating in favor of or against any candidate with respect to the use of lists of members" in violation of Section 481(c); and

3. By failing to offer "similar distribution at the request of another bona bide candidate", the union violated Section 481(c) in another respect.*

C. The union is collaterally estopped from claiming that the Newsletter is not campaign literature

Although Judge Motley independently concluded that the Newsletter was campaign literature distributed in violation of Section 481 (Opinion, A. 2882)** she also ruled that the union was already bound by Judge Croake's earlier identical determinations:

> "As a party to the action before Judge Croake in which the identical issue—as to whether the Newsletter was campaign material distributed at the expense of the IOMM&P—was litigated in a similar context as the one herein, the IOMM&P is collaterally estopped from asserting any findings contrary to those made by Judge Croake. *Zdanok* v. *Glidden Co.*, 327 F.2d 944, 954-56 (2d Cir. 1964), *cert. denied*, 377 U.S. 934 (1964)." (Opinion, A. 2882).

---

* The relief ordered by Judge Croake in his case, if it could even be considered sufficient to have rectified the wrong, came too late. The Newsletter had already taken its toll. As the District Court so aptly put it in *Wirtz* v. *American Guild of Variety Artists*, 267 F. Supp. at 543, similar distribution in the context of Section 481(c) means on the same terms and conditions and that means "at the same time."

** The whole document need not be considered campaign material; it is sufficient that the document contain passages which are campaign in character for the whole piece to fall in the campaign material category. See *Wirtz* v. *Independent Workers Union of Florida*, 272 F. Supp. 31 (M.D. Fla. 1967). See also *Hodgson* v. *Liquor Salesmen's Union, Local No. 2*, 334 F. Supp. at 1377, where the District Court noted that the defendant union's Journal in "tone and content" constituted campaign literature.

The union argues, however, that the case before Judge Croake was not "fully litigated" and thus cannot be binding on the union. As it did below, the union suggests this is so because that action only involved a prayer for preliminary relief and because Judge Croake failed to hold an evidentiary hearing. There is no merit to the union's arguments.

The case before Judge Croake did not involve only a prayer for preliminary relief. Final affirmative relief in the form of an order directing the IOMM&P to provide equal distribution of plaintiffs' literature was also sought. *Sheldon* v. *O'Callaghan*, 335 F. Supp. at 326 and 328. In fact, what was granted was such final relief. The requested preliminary injunction seeking a delay in the mailing of the election ballots was denied by Judge Croake on the ground that plaintiffs had not suffered irreparable injury in light of the post-election remedy then still available to set aside the election through the Department of Labor. However, Judge Croake did grant final relief by requiring the union to distribute the campaign literature submitted by plaintiffs. In so doing, the Judge disposed of the entire case, leaving nothing further to determine. As relates to the Newsletter the case was clearly over; the decision was final and the relief was not interlocutory.

In reaching his final decision, Judge Croake had before him all the factual material the union had to offer as to the Newsletter. Indeed, the union offered nothing more to Judge Motley regarding the Newsletter than it did to Judge Croake years ago.* In his affidavit submitted to

* Annexed as Exhibits B and C in the Appendix accompanying the Secretary's Reply Memorandum submitted below, the Court will find the affidavit of IOMM&P President O'Callaghan and the IOMM&P Memorandum of Law both of which were submitted to Judge Croake (A. 1997 and 2004).

Judge Croake, O'Callaghan described the context in which the document was mailed and argued, as the union does now, that the Newsletter was not campaign literature, that it only dealt with affiliation.

With this sworn affidavit (which is identical in substance to the affidavits submitted to Judge Motley in the instant case) and the Newsletter before him, Judge Croake had the union's full proof on the question of whether the Newsletter was campaign literature. As O'Callaghan himself said "The document speaks for itself." (Page 3 of his affidavit, A. 1999). And indeed it did. Clearly no hearing was necessary.*

Judge Croake determined the Newsletter "containing electioneering for the incumbent candidate, *ad-hominem* attacks upon an opposition candidate, coupled with the timing of the distribution, constitute[d] campaign literature for defendant O'Callaghan distributed at the expense of the defendant labor organization." at 327-328. He thus reviewed the Newsletter in the context of the affiliation issue as set forth by O'Callaghan himself. Having made his decision that the document was campaign literature, he ordered appropriate relief.

On October 29, 1971 the IOMM&P moved to reargue the case but not in respect to the finding that the Newsletter was campaign material.** Certainly if the union

---

* Furthermore in this case there was no need for a hearing on the preliminary injunction inasmuch as a preliminary injunction, at the union's insistence, was denied.

** In its Memorandum in support of its motion to reargue, a copy of which was annexed as Exhibit D to the appendix accompanying the Secretary's Reply Memorandum (A. 2014), the IOMM&P claimed it had had no opportunity to present evidence and that no hearing had been held, but that was with respect to a separate issue dealing with lists of members. There was no such concern with respect to the Newsletter as there seems to be now on this appeal. By endorsement November 15, 1971 Judge Croake actually granted the motion to reargue but adhered to his earlier decision. (Exh. H, Pltf.'s 9(g) Stmt., A. 1556).

had facts which it believed would have changed Judge Croake's determination regarding the Newsletter, it would have offered them at that time. On November 4, 1971 Judge Croake signed an order, *inter alia*, granting plaintiffs the right to have the union distribute literature submitted by plaintiffs. In the preamble of that order the Court noted that it had "filed a Memorandum *setting forth its findings of fact and conclusions of law . . .*" (emphasis added). (Exhibit DD, Pltf.'s 9(g) Stmt., A. 1468).

On December 3, 1971 the IOMM&P filed a notice appealing from the November 4, 1971 Order; on December 8, 1971 it filed a notice appealing from the November 15, 1971 endorsement. (Exh. JJ and KK, Pltf.'s 9(g), Stmt., A. 1557 and 1559). No further action was taken and on July 13, 1972, well after the election was over, the Clerk of the Court of Appeals entered a stipulation voluntarily dismissing the above mentioned appeals. (Exh. LL, Pltf.'s 9(g) Statement, A. 1561). By voluntarily dismissing its appeal, the union waived its right to have this Court review Judge Croake's final determination that the Newsletter was campaign literature. Under the criteria set down in *Zdanok* v. *Glidden Co.*, 327 F.2d 944, 954-56 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964), the union had been given a full and fair opportunity to be heard. The issues determined before Judge Croake did not have to be relitigated before Judge Motley, and she so found.*

---

*We wish to direct the Court's attention to a comparable situation in connection with two cases in the District Court of the District of Columbia. In *Yablonski* v. *United Mine Workers of America*, 305 F. Supp. 868, 871 and 874 (D.D.C. 1969) the Court found the union used its Journal as a campaign instrument and granted the private plaintiff certain injunctive relief. Then in *Hodgson* v. *United Mine Workers of America*, 344 F. Supp. 17, 23 (D.D.C. 1972), an election case brought by the Secretary, another Judge in the same court found "[b]oth on the grounds of comity and the evidence adduced at trial" the Journal was

[Footnote continued on following page]

POINT II

The 1974 election is not to be considered in reviewing this action with respect to the 1971 election.

In late 1974 and early 1975 the IOMM&P conducted its regularly scheduled election of officers. The results of that election are not disputed.* International President O'Callaghan and International Vice President Caldwell were forced into a run-off and then lost to Captains Scavo and Johnson, respectively. Incumbent International Secretary-Treasurer Lowen, however, retained his office. In the Offshore Division the O'Callagnan slate won approximately fifty percent of the races (see 2d footnote, p. 32, *infra*).

The union argues that in view of the 1974 election results the instant action should either be dismissed as moot, or that the District Court be instructed to determine whether the effects of the tainted election have been cleansed by the unsupervised 1974 election.

The union's argument has no merit. It ignores the express holding of the Supreme Court in *Wirtz* v. *Glass Bottle Blowers, Local 153*, 389 U.S. 463 (1968) and the holdings of the numerous cases following it. *Wirtz* v. *Hotel, Motel & Club Employees Union, Local 6*, 391 U.S. at 496-499 and n.9 at 500-501; *Wirtz* v. *Local Union No. 125, Laborers' International Union of North America, AFL-CIO*, 389 U.S. 477, 479 (1968); *Brennan* v. *Local 3489, United Steelworkers of Am., AFL-CIO*,

---

used as a campaign tool. Here the material facts are established and not in dispute and no trial would have been necessary before Judge Motley even if Judge Croake had not come to the conclusion he did.

* Annexed as Exhibit I to the appendix accompanying the Secretary's Reply Memorandum submitted to the District Court is the IOMM&P Election Report for the 1974 Election. (A. 2062-2074).

520 F.2d 516, 518 n.3 (7th Cir. 1975); *Brennan* v. *Silvergate Dist. Lodge No. 50, Int. A. of M.&A.W.*, 503 F.2d 800 (9th Cir. 1974); *Hodgson* v. *Local Union 400, Bakery & Confectionery Workers International Union of America, AFL-CIO*, 491 F.2d 1348, 1349 (9th Cir. 1974); *Brennan* v. *International Union of District 50, Allied and Technical Workers of the United States and Canada*, 499 F.2d 1051, 1057-1058 n.13 (D.C. Cir. 1974); *Hodgson* v. *Local 1299, United Steelworkers of America*, 453 F.2d 565, 576-577 (6th Cir. 1971); *Wirtz* v. *Local Union No. 1622, United Brotherhood of Carpenters and Joiners of America, AFL-CIO*, 285 F. Supp. 455, 463 (N.D. Cal. 1968). As these cases make clear, the 1974 election cannot be considered in any way in connection with the instant case.

In the *Glass Bottle Blowers* case, Mr. Justice Brennan stated the Court's unambiguous holding as follows:

> "*We therefore hold* that when the Secretary of Labor proves the existence of a § 401 violation that may have affected the outcome of a challenged election, the fact that the union has already conducted another unsupervised election does not deprive the Secretary of his *right* to a court order declaring the challenged election void and directing that a new election be conducted under his supervision." (389 U.S. at 475-476). [Emphasis added]

In reaching this result, the Court recognized that the interests of a particular union member in a particular union election must yield to the public's superior interest in assuring that union elections are free and democratic. ". . . Congress emphatically asserted a vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member." *Glass Bottle Blowers*, *supra* at 475. This has been strongly re-emphasized by the Supreme Court in *Wirtz* v. *Local 125, Laborers' International*

Union of North America, *supra*, at 482-483 and again in *Wirtz* v. *Hotel, Motel & Club Employees Union, Local 6*, *supra*, at 496-497. The Court also noted that the Congress, in enacting Section 482 of the Act, determined that *only* the supervision of the Secretary of Labor could protect the public's interest once a tainted election had been held and the union had failed to remedy the election's abuses prior to the filing of a complaint by a union member pursuant to Section 482(a) of the Act. *Glass Bottle Blowers*, *supra*, at 474-475; see also *Hodgson* v. *Local U. 400, Bakery and Confectionery W.I.U.*, *supra*, at 1351-1352. "[T]he happenstance intervention of an unsupervised election" (*Glass Bottle Blowers*, *supra*, at 474) would not satisfy the statutory scheme of remedying election violations by a *supervised* election.

As Judge Motley recognized in this case:

> "Congress intended to guard against a multiplicity of influences which the results of a tainted election may have on subsequent union activities. In this case, for example, the results of the 1971 election may not only have allowed incumbents to have maintained a personal advantage for the 1974 election, but also may have prevented others from rightfully developing the same benefits of incumbency. Others, too, may have withheld their candidacies in 1974 preferring to await an election that was supervised by the Secretary of Labor. In all respects the day to day decisions of the union leadership may have been different over the last three years had other officers been elected in 1971, and such differences may have led to different results in 1974. Just because incumbents do not win re-election does not mean that the subsequent unsupervised election was not in some way affected by the results of the challenged election. The possible influences on the

> outcome of the 1974 election are incalculable and the only way to guard against them is to have the remedial election supervised by the Secretary. A supervised election guards against much more than just incumbents flaunting their incumbency at the time of the subsequent unsupervised election." (Opinion, A. 2871-2872).

In short only a supervised election will guard against the unfairness of a tainted election from "infecting directly or indirectly" subsequent elections. *Glass Bottle Blowers, supra*, at 474.

If, as the union urges, the fairness of intervening elections were to be considered in Section 482 actions, a union could easily insulate its elections from the Secretary of Labor's supervision. It could do so by delaying the completion of a Section 482 action until after an intervening election were held and then delay an adjudication as to the fairness of that election until after the next election were held. Since this process could go on indefinitely there would be no incentive for incumbent union leadership—whoever it was—to deal seriously with the Department of Labor or complaining union members with regard to remedying election abuses. The Court recognized this danger in *Hodgson* v. *Local Union 400, Bakery & Confectionery W.I.U., supra* and applied the rule of *Glass Bottle Blowers* to a special unsupervised "remedial" election which was held even before the Secretary of Labor commenced a Section 482 action, but after a union member had properly filed a complaint with the Secretary under Section 482(a) of the Act.*

---

* In that case the Court rejected a union position that "[t]he uncontested validity of the second [unsupervised] election deprives the Secretary of any grounds to contest the first, for a condition precedent to his bringing an action is an *unremedied* violation." *Hodgson* v. *Local Union 400, Bakery & Confectionery W.I.U., supra*, at 1350.

Furthermore, a review of a subsequent election to determine whether a tainted election has been cured would have to focus on every aspect of the officer selection process, just as the Secretary does when supervising an election. Clearly, such a court review was not envisioned by Congress as evidenced by its restricting review to only those issues raised initially by a member's complaint to the Secretary and then by the Secretary's complaint to the Court. See 29 U.S.C. § 482(a); *Hodgson* v. *Local U. 6799 United Steelworkers of America*, 403 U.S. 333 (1971).

". . . Congress . . . *settled* enforcement authority on the Secretary of Labor to insure that serious violations would not go unremedied and the public interest go unvindicated." *Wirtz* v. *Hotel, Motel & Club Employees Union, Local 6, supra*, at 498.* (Emphasis added.) Thus, once a violation has been proved that may have affected the outcome of an election it is the Secretary's "right to a court order declaring the challenged election void and directing that a new election be conducted under his supervision." *Glass Bottle Blowers, supra*, at 475-476.

In *Brennan* v. *Local 3489, United Steelworkers of Am., AFL-CIO, supra*, the Seventh Circuit recognized

* In that case the Supreme Court was asked to review the reasonableness of a by-law provision restricting the number of candidates for office to only a very few members. At the District Court the union had urged, among other things, that consideration of the questioned by-law provision was moot because the union had liberalized the by-law amendment. The District Court ruled that the amendment also was unreasonable. While the Supreme Court noted that that part of the District Court's ruling was not before it, it nevertheless stated: "In any event, respondent's argument that the amendment renders this case moot is foreclosed by *Wirtz* v. *Bottle Blowers, supra*, at 475-476. See also *Wirtz* v. *Laborers' Union, supra*, at 479." *Wirtz* v. *Hotel, Motel's Club Employees Union, Local 6, supra*, at 500-501 n. 9.

the rule of *Glass Bottle Blowers* was controlling even where an individual who originally complained to the Secretary eventually won the subsequent unsupervised election and the incumbent lost. 520 F.2d at 518 n.3. Thus, the results of a subsequent election, even where the incumbents have lost, are irrelevant as a matter of law.* Accordingly, we submit that the 1974 election does not moot, nor can it be considered in, the instant case.**

---

* See also *Wirtz* v. *Local Union No. 1622, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, supra*, at 163, where the Court noted that "the fact that no complaint was ever made to the Secretary relating to the second election is *irrelevant* since the Secretary has established a violation of the Act respecting the first election and this violation 'may have affected the outcome of the election.' 29 U.S.C. § 482(c)." (emphasis added). That Court went on to note that it was also irrelevant that the member who lost the first election and instituted the complaint with the Secretary chose not to run in the unsupervised second election.

See also *Brennan* v. *Local 551, United A., A&A Imp. Wkrs. of A., Inc.*, 486 F.2d 6, 8 (7th Cir. 1973).

** Even if the 1974 election could be examined in conjunction with this case, the union's assertion that the "O'Callaghan 'slate' lost two of the three International offices; two of the three Offshore Division Vice President offices; and more than two-thirds of the Offshore Division Port Agents" (Appellant's Brief, p. 3) would be misleading. (In the District Court, it was claimed that a "large majority" of the O'Callaghan slate lost. A. 1806).

While O'Callaghan and Caldwell may have lost, the fact is that incumbent Secretary-Treasurer Lowen did win. In addition, 17 out of 35 of those running for Offshore Division office also won. Compare the 1974 IOMM&P Election Results (Exh. I annexed to the appendix submitted with the Secretary's Reply Memorandum in the District Court, A. 2062) with the list of candidates identified as members of the O'Callaghan slate (the IOMM&P's Election Supplement of the "Master Mate and Pilot" Newspaper identifies slate members by the slogan "For Continued MM&P Progress, Prosperity and Strength Vote for the O'Callaghan Team"—Exh. J annexed to the appendix submitted with the Secretary's Reply Memorandum in the District Court, A. 2075).

POINT III

The scope of the Secretary's supervision of a court ordered election is very broad; it allows the Secretary to set the date of the new election and to direct the union to abandon constitutional provisions which violate the Act.

Once it has been established that a violation of Section 481 may have affected the outcome of an election

> [T]he court shall * declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. 29 U.S.C. §482(c).

Congress was committed to making the Secretary's intervention in union elections, once warranted, effective (*Glass Bottle Blowers, supra* at 473) and a supervised election is the *only* way to ensure that the influence of a tainted election may be eliminated. Further, if the Court orders a new supervised election, the order "shall not be stayed pending appeal." 29 U.S.C. §482(d).

The Secretary's supervisory authority is exceptionally broad and his decisions made in connection therewith must be heeded by the union. *Brennan* v. *Local 551, United A. A.&A. Imp. Wkers. of A., Inc.*, 486 F.2d 6 (7th Cir. 1973); *Brennan* v. *Sindicato Empleados de Equipa Pesado, etc.*, 370 F. Supp. 872 (D.P.R. 1974).

In *Brennan* v. *Local 551, United A. A.&A. Imp. Wkers. of A., Inc., supra*, then Circuit Judge Stevens dis-

* The Supreme Court twice emphasized the word "shall" in the *Glass Bottle Blowers* case (389 U.S. at 468 and 474) and indeed such mandate is clear.

cussed the Secretary's election supervisory powers. In holding that the Secretary, and not the union, could determine the *date* the supervised election was to be conducted, the Court stated:

> The order of June 18, 1973, [directing a supervised election] specified a remedy which necessarily involves governmental intervention and supervision of a critical aspect of the union's activities, namely its election process. In order to achieve the purpose of the statute, the Secretary must be afforded a wide range of discretion in discharging his supervisory responsibility. The leadership of the union must respect his authority. At 10.

Included within the Secretary's supervisory authority is the power to determine whether provisions of a union's constitution and or by-laws then existing are lawful within Section 481 and if not lawful to require the union to discard them in favor of proper substitutes, if appropriate. Section 482(c) specifically states that the new election under the Secretary's supervision is to be conducted "*so far as lawful* and practicable, in conformity with the constitution and bylaws of the labor organization." (emphasis added). Once a supervised election is triggered the intention is to ensure that the new election is conducted fairly and lawfully in all respects, for no other meaning would allow the Secretary's "intervention, once warranted," to be "effective." *Glass Bottle Blowers; supra*, at 473.

The logic of the Sixth Circuit in *Hodgson* v. *Local 1299, United Steelworkers of America*, 453 F.2d 565 (6th Cir. 1971) is relevant. There in reversing a District Court's decision to restrict the Secretary's supervision to the balloting aspect of a new election, the Circuit Court found it advisable "to allow the Secretary to supervise the entire election if he deems it necessary."

Id. at 577. The Circuit Court said: "Not only would this afford maximum protection to the union members but it would also avoid the multiplicity of litigation that could result from incumbent officers violating a different provision of Section 401 [481 of Title 29, U.S.C.] in each new election." *Id.* at 577.

In *Hodgson* v. *Local U 6799 United Steelworkers of America*, 403 U.S. 333 (1971) Mr. Justice White in his dissent * stated that with respect to a court ordered supervised election the Secretary "is under no obligation, indeed forbidden, to follow a provision of the bylaws or constitution that is unlawful." at 343. Mr. Justice White further added, at 344: "[I]f the Secretary finds an invalid bylaw that purports to govern a new election that has been validly ordered on a claim that has been exhausted, as in this case, the Secretary appears to have express grounds in the Act, independent of the complaint-exhaustion requirements, to insist that the new election be conducted in accordance with the law and to insist that a court adjudicate the matter if the union stands by its bylaw povision."

Quoting from Mr. Justice White's opinion and a subsequent majority opinion of the Supreme Court,** the

---

* This aspect of Mr. Justice White's dissent was not inconsistent with the majority opinion. The majority opinion merely said the initiation of the Secretary's action must be limited to complants which a complaining member first appealed to his union, unless the particular violation discovered by the Secretary during his investigation was not one that could be discerned by the complaining union member. The majority did not limit the scope of supervision.

** *Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972) wherein the Court strictly limited rights intervenors had to participate in the Secretary's action to set aside the contested election but in a footnote, noted the limitation was not as stringent with respect to assisting the Secretary fashion a suitable remedy once the court ordered a new supervised election. (at 537 n.8)

Court of Appeals for the District of Columbia in *Brennan v. Local Union 639, Int. Bro. of Teamsters, Etc.*, 494 F.2d 1092 (D.C. Cir. 1974), stated the "The [Supreme] Court has clearly distinguished between using a violation as a ground to set aside an election and using a violation with respect to setting the ground rules for a new election which has been ordered." at 1099. It then went on to hold that the district court had not erred by directing the union in the course of the new election not to use an invalid bylaw provision, notwithstanding the fact that that violation might not even have constituted a ground to set aside the election in the first instance.

Accordingly, the new election once ordered is subject to the Secretary's supervision and directives in all respects. The Secretary has the supervisory power to determine whether the provisions of the union's constitution and by-laws are lawful within section 481, to require that the union abandon or modify those provisions he determines to be violative of the section 481, to determine the date of the election and, in the event the union refuses to adhere to the Secretary's directives, to seek appropriate judicial assistance.

Illegal Provisions of the IOMM&P Constitution and Offshore Division By-Laws.

One such set of illegal provisions in fact exists in the charters of the IOMM&P and the Offshore Division. As structured by the IOMM&P Construction and Offshore Division By-Laws, the three International officers—who are elected by a vote among all members of the union—automatically become the three top officers of the Offshore Division without there being a separate election therefore among the members of the Offshore Division only. See IOMM&P Constitution, Art. IX, Sec. 8, (A

1331-1332); Art. VI, Sec. 1(g), Sec. 2(d) and Sec. 3(m) (A. 1318-1322); Offshore Division By-Laws, Art. V, Sec. 1 (A. 1348). In their capacities as Executive Officer, Assistant Executive Officer and Financial Officer of the Offshore Division each has significant responsibilities and performs significant duties for the Offshore Division alone.*

Pursuant to Section 481 labor organizations must *elect* their officers. If they fail to do so they violate Sections 481(a), (b) or (d) (which mandate that elections be held) as well as Section 481(e) (which requires that each member have the right to nominate, vote for and otherwise support the candidate or candidates of his choice).

The union does not contend that the Offshore Division is not a labor organization as defined in the Act (29 U.S.C. § 402(i) and (j)) or that the Offshore Division Executive Officer, Assistant Executive Officer and

---

*The Offshore Division by-laws set forth the duties of these Executive officers, Art. VI, Secs. 1, 2 and 3. (A. 1348-1349).

Among other things the Executive Officer enforces all provisions of the Offshore Division collective bargaining agreements, acts as chairman or designates a chairman of the Offshore Division's collective bargaining Negotiating Committee; and settles disputes, interpretations, grievances or complaints involving Offshore Division collective bargaining agreements.

The Assistant Executive Officer, *inter alia*, assists the Executive Officer and acts in his stead when the latter is not able to perform his duties.

The Financial Officer receives all monies payable to the Offshore Division and directly, or through delegates, issues receipts for the same. Additionally, among his other duties, he is responsible for the Offshore Division's records, bonds and its other finances and property and signs all checks in payment of the Offshore Division's obligations.

Financial Officer are not officers, as also defined in the Act (29 U.S.C. § 402(n)).*

The IOMM&P maintains, rather, that 1) the Act "does not impose an absolute requirement that each member of a labor organization have a right to vote for all officers who govern that labor organization," 2) the Act does not "impose an absolute prohibition against any person who is not a member of a particular subordinate organization (but who is a member of the parent organization) participating in the selection of persons to fill prescribed positions in the subordinate organization," and 3) the Act does not impose an "absolute prohibition upon duly elected officers of a parent union serving, by virtue of their offices, as officers of a subordinate union."

These arguments miss the point entirely. The Secretary is not complaining, for example, that the union failed to give each member a right to vote for a candidate for office where an election was held. Nor is the

---

* The Offshore Division Executive officers perform enough of the functions (see footnote p. 37, *supra*) set forth in 29 U.S.C. § 402(i) to more than qualify the Offshore Division as a labor organization. This fact was reaffirmed by the union's counsel in his papers submitted in response to the Secretary's motion for summary judgment (A. 1815-1816). See also, statements made by International Secretary Lowen during his deposition (A. 2319, 2339, 2340 and 2347). See *Brennan* v. *United Mine Workers of America*, 475 F.2d 1293, 1296 (D.C. Cir. 1973).

Under the definition of "officer" (29 U.S.C. § 402(n)) the three Executive Officers of the Offshore Division must not only be considered "constitutional officers" by virtue of their inclusion in the Offshore Division By-Laws, but also these officers perform such "executive functions" as to require that they be deemed "officers" under the definition. See also statements made by International Secretary-Treasurer Lowen during his deposition (A. 2345-2346). See *Wirtz* v. *National Maritime Union of America*, 399 F.2d 544, 550-553 (2d Cir. 1968).

Secretary attempting to place an absolute restriction on one individual from holding two executive offices. Rather, the Secretary maintains that if a position is to be filled that has certain "executive responsibilities," it must be filled by a separate election among those whom the officer will represent. The Secretary would not object if a member of the Offshore Division wanted to run for both International President and, simultaneously for Offshore Division Executive Officer, *provided* that there were separate elections held for both positions, and that with respect to the Offshore Division position the election was held among the Offshore members only.

It cannot be argued that the Offshore Division members participated sufficiently in the selection process of their own top officers through their voting for International officers. That argument would be contrary to democratic principles as known in the United States upon which union elections must be based. See *Wirtz* v. *Hotel, Motel & Club Employees, Local 6*, 391 U.S. at 496, 504. It is tantamount to arguing that it would be proper for the President of the United States to assume the role of Governor of New York simply because the people of New York participated in the President's selection. That is precisely the relationship between the IOMM&P International officers and the three top officers of the Offshore Division that the union suggests is proper. Such a scheme is undemocratic and should not be tolerated. The Offshore Division performs significant, separate functions for its members. These members alone should have the right to elect their own officers.

In *Hotel, Motel & Club Employees, supra*, the Supreme Court noted that the congressional history of the Act "indicated a need to protect the rights of the rank-and-file members to participate fully in the operation of their

union through processes of democratic self-government, and, through the election process, to keep the union leadership responsive to the membership." 391 U.S. at 497. In both the House and Senate the point was well articulated: "The Government which gives unions . . . power has an obligation to insure that the officials who wield it are responsive to the desires of the men and women whom they represent." S. Rep. No. 187, 86th Cong., 1st Sess., (1959); H.R. Rep. No. 741, 86th Cong., 1st Sess., (1959); 1959 U.S. Code Cong. & Adm. News, pp. 2336 and 2438.

The scheme whereby Offshore Division Executive officers are "elected", however, is fraught with the potential for electing those who are not "responsive" to or representative of the Offshore Division membership. It is not unlikely that an Offshore Division member running under the present scheme for International President could receive a majority of Offshore Division votes but fail in his bid to become International President. This result would deprive Offshore Division members of their choice for Offshore Division Executive Officer, an officer who performs vital functions for the Offshore Division as a separate entity.*

A fair reading of Sections 481(a), (b) and (d) of the Act leads to the clear conclusion that each labor organiza-

---

*Indeed, this is just what happened in the 1974 election for International Secretary-Treasurer. Incumbent Secretary-Treasurer Lowen was defeated by Captain Brown in total Offshore Division votes but won the election because of his plurality in the Inland and Pilots Divisions. Although not the choice of the Offshore Division, Lowen became its Financial Officer. He now performs vital executive functions for a labor organization whose members rejected him at the polls. This, we submit, is just the kind of situation the Act sought to prohibit by requiring that labor organizations elect its own officers.

tion must elect its own officers.* Democratic principles require that those who are to be represented should alone have a right to select their representatives. Their votes should not be diluted by outsiders whose interests may not always coincide. If the IOMM&P wants to concentrate power in its International officers, they can do so by modifying its charter in some appropriate way. However, the scheme now used to effect that purpose does not square with the requirements of Section 481.**

---

*The Second Circuit's opinion in *Wirtz* v. *National Maritime Union of America*, 399 F.2d at 551-3 is on point. There, a port agent and certain patrolmen of the defendant union were found to be "officers" for which positions an election had not been held in violation of section 481(a). The situation is similar in the instant case.

The union cites no cases to the contrary. *Fritsch* v. *District Council No. 9, Brotherhood of Painters, Decorators and Paper Hangers of America*, 493 F.2d 1061 (2d Cir. 1974), *aff'g*, 359 F. Supp. 380 (S.D.N.Y. 1973), and the other cases cited at pages 35-36 of the union's brief, at best, stand for the proposition that voting schemes such as the one here at issue are reviewable under Title IV of the Act, but not Title I. In this connection, we note that the District Judge in *Fritsch* expressly stated that the voting scheme it could not reach in that Title I action was illegal under Title IV because it permitted members of one labor organization to participate in the selection of a bargaining representative for an affiliated labor organization. 359 F. Supp. at 395. The IOMM&P provisions here have the same effect. This is a Title IV action; they should be declared illegal.

**It should be noted that the Secretary brought a separate action against the IOMM&P in connection with its 1974 election of officers (75 Civ. 2695 (S.D.N.Y.)) principally complaining about this improper scheme for "de facto" appointing the Offshore Division Executive officers. The Secretary alleged that it violated Section 481(b) as well as 481(e). While Section 481(b) relates to a local labor organization, it may be the Offshore Division is more like a national organization falling within the purview of 481(a) (or possibly—but unlikely—an intermediate labor organization within the meaning of 481(d)). If one or the other were established we ultimately would have asked the District Court to permit the Secretary to amend his complaint to conform to the proof.

[Footnote continued on following page]

In his complaint the Secretary questioned the legality of this scheme but did not move for summary judgment on it; nor did the District Court rule on it. This did not mean that it ceased to be illegal. The Secretary's judgment was and is that it is improper and that its continued operation in a supervised new election would not be "lawful" under Section 482(c). The District Court, however, was not obliged to decide this issue in connection with its decision that the 1971 election was void and that a new supervised election should be conducted. Indeed, the District Court might never have been called upon to rule on this illegal scheme. Unless and until the union defied the Secretary's "supervisory" directive with respect to it, there was no certainty the union would not abandon these improper Constitutional and By-law provisions. In not ruling on the matter Judge Motley exercised proper restraint by leaving to the Secretary's authority, in this first instance, the supervision of the new election in all respects.

This Court need not decide what type of labor organization the Offshore Division is, however, or by either what it is called the plain fact is that *no election* was held for its Executive officers. That is all that is necessary to show a violation of Section 481 existed. Here, it so happens, the Offshore Division must hold its elections simultaneously with those of the International (Offshore Division By-Laws, Art. XIX, Sec. 2(a), A. 1356) which means its elections must be every three years. (IOMM&P Constitution, Art. V, Sec. 3(1)(3), A. 1310).

In addition since elections for the Offshore Division Executive officers were not held, necessarily the union violated Section 481(c) by not permitting members the right to nominate, vote for and otherwise support candidates of their choice. A violation of this Section, unlike those of Section 481(a), (b) and (d), requires a showing pursuant to Section 482(c) that it "may have affected" the outcome of the election. Since no opportunity was provided at all to the members to directly nominate, vote for and support candidates for their own Executive officers, *a fortiori* these violations "may have affected" the outcome of the "elections" for these offices.

If, however, in the opinion of this Court it would seem to have been preferable for the Court below to have decided this issue, there is no reason, in the interest of judicial economy, it cannot be decided by this Court now. The matter is properly one of law. No facts are in dispute—the scheme is or is not illegal. It is apparent by this appeal the union will defy the Secretary's instructions on this matter. Accordingly, while the issue may shortly be before the District Court for a "supervisory" ruling, to avoid yet another appeal it may be prudent for this Court to decide this issue now.*

The Supervised Election Must Be Completed by December 31, 1976.

On the recommendation of the Secretary set forth in his proposed judgment, Judge Motley ordered that the supervised election be completed by December 31, 1976, —nearly nine months from the entry of the final judgment and order. The union had urged that the supervised election be conducted at the time of the next regularly scheduled election which in this case would be from the middle to the end of 1977.

As the Court in *Brennan* v. *Local 551, United A., A. & A. Imp. Wkers. of A. Inc.*, *supra* at 7, held, "the Secretary's power to supervise an election required by a court order clearly includes the power to set the date of that election." In the instant case, in view of the procedures necessary to conduct an election for this sea-going union, a completion date of December 31, 1976 is well founded and consistent with the purposes of the Act.

---

* There is no reason this issue, now one of law, cannot be decided by this Court if it chooses. See legal support page 46, *infra*. We note that the union originally moved for summary judgment with supporting papers on this point. (A. 1813-1818).

The Act itself contemplates that a tainted election should be remedied quickly, as evidenced, for example, by the provision that precludes a stay of an order directing a new election pending appeal (29 U.S.C. § 482(c)). See Cox, Internal Affairs of Labor Unions, Under the Labor Reform Act of 1959, 58 *Mich. L.R.* 819, 845 (1960). There is good reason for that policy. If the law were to permit a union to insist that a supervised election be conducted whenever it held its next regular election, there would be no incentive whatsoever for unions to obey the requirements of Section 481. Candidates would just violate the law, get themselves elected and stay in office until the next regular election, building the benefits of incumbency, and then start the same process all over again.

Incumbents—whether elected during the tainted election or at a subsequent unsupervised election—should not be permitted to prolong their terms more than is absolutely necessary. The day to day decisions of the union leadership should be given, as soon as possible, to those who, in the scheme of the Act, are properly elected during a supervised election. Those in office should not be given a preference—by virtue of their incumbency—over other candidates in the next election.

In the instant case, the union officers elected in the 1974 election had been in office for approximately one year, or one-third of their term, when Judge Motley granted summary judgment and ordered a new election. The union's next regularly scheduled election will not take place until late 1977,* with newly elected officers not installed until 1978 at the earliest. Thus, the union, in effect, is asking that its present officers be allowed a grace period in excess of half their terms of office. To wait this long would do violence to the Act's purpose

---

* Nominating conventions are held in the summer. Election ballots will be mailed in September to be returned no later than three months later, as was the procedure in 1971 and 1974.

of remedying a tainted election expeditiously. That a new election not aligned with the union's next regular election may add further cost or cause the normal electoral processes set forth in the union's constitution to be disrupted is no excuse for delaying a supervised election. If elaborate election procedures, for example, could serve as an excuse to delay a supervised election, unions would only be encouraged to include such procedures in their charters as a safety valve in the event an election case is brought by the Secretary. Congress anticipated that the normal election provisions in a union's constitution might not always be the most suitable during a court ordered election and that is precisely why the Act permits the Secretary to supervise a court ordered election consistent with the union's constitution so far as it is "lawful and *practicable*" (Section 482(c)).

The fact that the union has been ordered to conduct another referendum concerning the adoption of its 1970 constitution by Judge Knapp also is no excuse to delay the supervised election, as the union suggests. (Appellant's Brief, pp. 32-33) As the District Court observed, the possibility of the 1970 Constitution being discarded and another election mandated was "far too tenuous to prevent this court from remedying the violations which it finds to have occurred in the matter duly before it." (Opinion, n.2, A. 2890). In that connection we note that if the Constitution were discarded under Judge Knapp's scheme, it would not be for quite some time.*

In summary, we submit that neither the Secretary's request nor the Court's order that the election be completed by the end of this year was abitrary. Indeed, to have further prolonged the election would have contravened the Act's goal that supervised elections be held quickly.

---

* Nor can one be sure that even Judge Knapp's schedule will be complied with. Counsel for the IOMM&P has advised in fact, that he has requested a conference with Judge Knapp to ascertain if the order in that case should not in some way be modified in view of Judge Motley's holding.

POINT IV

This Court may examine other violations committed during the 1971 election to sustain the district court's decision in the event the "Newsletter" is insufficient.

An appellate court does not have to affirm a decision on a summary judgment motion for the same reason that persuaded the court below to grant the motion. It can find another ground, based on anything that appears in the record, for concluding that the movant is entitled to judgment as a matter of law. Wright & Miller, Federal Practice and Procedure: Civil § 2716, p. 440; *Bigelow* v. *Agway, Inc.*, 506 F.2d 551, 555 (2d Cir. 1974); *Picture Music, Inc.* v. *Bourne, Inc.*, 457 F.2d 1213, 1215 n.5 (2d Cir. 1972).

In the instant case the Secretary moved for summary judgment on five of the violations alleged in the complaint. See p. 3, *supra*. Judge Motley found that the violations caused by the preparation and distribution of the Newsletter was alone sufficient to void the 1971 election and to order a new election subject to the Secretary's supervision. The District Court did not feel it necessary to rule on the other four violations since the Newsletter "comprehends all the contests in the election which are involved in the additional alleged violations, and any decision regarding such violations would not affect the ultimate disposition of the case." (Opinion, A. 2888-2889).

In the event this Court disagrees with Judge Motley's findings that the Newsletter was campaign material and believes that Judge Croake's decision to that effect is not binding on the union, we urge it to examine the record with respect to the other issues on which the Secretary moved for summary judgment for an alternative basis upon which to support the order of a new supervised

election. It would be in the interests of all parties and judicial economy to proceed in this way.

Each of the other four violations was fully briefed below and all relevant factual material was supplied. Without elaborating on each we respectfully refer this Court to those portions of the parties' District Court memoranda related to each violation. Those memoranda provide ready reference to all supporting data which also appears in the Joint Appendix.

1. The violations of Sections 481(c) and (g) caused by the preparation and mailing of the "Eleven Pledges": Secretary's memorandum—A. 1654-1660; IOMM&P's Response—A. 1789-1790; Secretary's Reply—A. 1944-1945.

2. The violations of Section 481(e) caused by prohibiting certain members of the Offshore Division's Atlantic and Gulf areas from participating in any way in the selection of Offshore Division Vice Presidents for the Atlantic and Gulf Areas: Secretary's Memorandum—A. 1661-1671; IOMM&P's Response—A. 1790-1796, 1863-1864; Secretary's Reply— A. 1946-1953.

3. The violation of Section 481(e) caused by the union's failure to mail ballots within 30 days after the close of nominations (i.e. not in accordance with IOMM-&P Constitution): Secretary's Memorandum A. 1673-1677; IOMM&P's Response—A. 1796-1860, 1864-1866; Secretary's Reply—A. 1953-1956.

4. The violation of Section 481(e) caused by the failure to provide candidates with a certified list of Local 88 (now the Port of New York) members (i.e. not in accordance with Offshore Division By-Laws): Secretary's Memorandum—A. 1677-1683; IOMM&P's Response—A. 1800-1802, 1866-1867; Secretary's Reply—A. 1957-1962.

It is submitted that since there were and are no material facts genuinely in dispute with respect to the above violations, nothing would preclude this Court from rendering a decision thereon if necessary.

CONCLUSION

It is respectfully requested that the judgment and order appealed from be affirmed, and that if this Court finds it would be preferable to reach a decision regarding the legality of the scheme whereby International officers of the IOMM&P automatically become the three top officers of the Offshore Division, then such scheme should be declared illegal in violation of Section 481 of the Act.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York,
Attorney for W. J. Usery, Secretary of Labor,
Plaintiff-Appellee.

DENNISON YOUNG, JR.,
STUART I. PARKER,
FREDERICK P. SCHAFFER,
Assistant United States Attorneys,

FRANCIS V. LA RUFFA,
Regional Solicitor,
RUDOLPH E. DE MEO,
Attorney,
United States Department of Labor,
Of Counsel.

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

CA 76-6076

State of New York)
County of New York) ss

Pauline P. Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the

8th day of **June**, 19 **76** she served **2** copy of the within **govt's brief**

by placing the same in a properly postpaid franked envelope addressed:

Marvin Schwartz, Esq.,
243 Waverly Place
New York, NY 10014

And deponent further says she sealed the said envelope and placed the same in the mail ~~xxxxx~~ drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

8th day of **June**, 19 **76**

Lawrence Mason

LAWRENCE MASON
Notary Public, State of New York
No. 03-[illegible]
Qualified in Bronx County
Commission Expires March 30, 1977

Qualified in Bronx County
Commission Expires March 30, 1977